

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MIKE NEWCASTLE,

3:13-cv-00091-RCJ-VPC

Plaintiff,

v.

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

L. C. ADAMS, *et al.*,

Defendants.

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#47). Plaintiff opposed (#49), and defendants replied (#50). The court has reviewed the motion and papers, and hereby recommends that the motion be granted.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mike Newcastle ("plaintiff") is an inmate in the custody of the Nevada Department of Corrections ("NDOC"). Although plaintiff is presently incarcerated at High Desert State Prison ("HDSP") in Indian Springs, Nevada, most events giving rise to this action occurred during a period of incarceration at Ely State Prison ("ESP") in Ely, Nevada. Pursuant to 42 U.S.C. § 1983, plaintiff brings civil rights claims against ESP officials.

In the screening order, the District Court permitted plaintiff to proceed on count I's Eighth Amendment claims against ESP correctional officers James Bruffy ("Bruffy"), Benjamin Kelly ("Kelly"), and Michael Cardinal ("Cardinal"), and ESP Warden Renee Baker ("Baker"). (#4 at 4-5.) The District Court dismissed count II's Fourteenth and Eighth Amendment claims and count III's Eighth Amendment claim. (*Id.* at 7-10.) Although given leave to amend as to most of the count II claims, plaintiff did not file an amended complaint to cure the deficiencies. In addition, on April 21, 2015, the District Court dismissed the count I claims against Kelly and Cardinal due

1 to plaintiff's failure to serve (#54). Accordingly, at this time, only the Eighth Amendment claims
2 against Bruffy and Baker remain in this action.

3 The alleged violations of plaintiff's Eighth Amendment rights relate to a series of events
4 in March 2011. On March 7, 2011, plaintiff brutally battered a non-custodial prison employee in
5 ESP's culinary area.¹ Several ESP officers and officials, including defendant Bruffy, responded
6 to the emergency. Plaintiff alleges that, during his apprehension, Bruffy used excessive force in
7 restraining him. Specifically, plaintiff contends that Bruffy choked him, caused him to
8 asphyxiate in his own vomit, dislocated his jaw, injured his shoulder and elbow, and kned him in
9 the face and the head. (#5 at 9.) Plaintiff contends that he had already been placed in full
10 restraints at the time these actions occurred, and that these uses of force caused abrasions, bruises,
11 swelling, permanent scars, and numbness. (*Id.*) Thereafter, plaintiff alleges that various
12 prison officials, upon Baker's order, isolated him in areas of ESP and later HDSP for
13 approximately one week without clothing and personal property, including his eyeglasses. (*Id.* at
14 14.) He contends that he was maintained in these areas with continual illumination and under
15 constant video surveillance, "resulting in intense humiliation and sleep deprivation." (*Id.*)

16 II. LEGAL STANDARD

17 Summary judgment allows the court to avoid unneeded trials. *Nw. Motorcycle Ass'n v.*
18 *U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary
19 judgment when the record discovered by the parties demonstrates that "there is no genuine issue
20 as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
21 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify
22 which facts are material. Only disputes over facts that might affect the outcome of the suit under
23

24 ¹ The incident led to a state court criminal proceeding against plaintiff, in which he was convicted
25 to a lengthy term of incarceration that runs concurrently with his underlying sentence for first-
26 degree murder. *See Newcastle v. Nevada*, No. 64740, 2014 WL 4672902, at *1 (Nev. Sept. 18,
27 2014). The parties do not appear to dispute that plaintiff engaged in this conduct, but in any
28 case, plaintiff would be precluded from arguing the point. His battery of the employee was an
issue actually and necessarily litigated in the state criminal action; the issue is identical to the fact
in this case; plaintiff was a party to the prior action; and the conviction was on its merits and is
now final. *See In re MGM Derivative Litig.*, No. 2:09-cv-01815-KJD-RJJ, 2014 WL 2960449, at
*3 (D. Nev. June 30, 2014) (discussing the requirements for issue preclusion in this district).

1 the governing law will properly preclude the entry of summary judgment. Factual disputes that
 2 are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby*, 477 U.S. 242,
 3 248-49 (1986). A dispute is “genuine” only where a sufficient evidentiary basis would allow a
 4 reasonable jury to find for the nonmoving party. *Id.* “The amount of evidence necessary to raise
 5 a genuine issue of material fact is enough ‘to require a jury or judge to resolve the parties’
 6 differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir.
 7 1983) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)).
 8 Conclusory statements, speculative opinions, pleading allegations, or other assertions
 9 uncorroborated by facts are insufficient to establish a genuine dispute. *Nelson v. Pima Cmty.*
 10 *Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

11 Summary judgment proceeds in burden-shifting steps. When the moving party bears the
 12 burden of proof at trial, it must support its motion “with evidence which would entitle it to a
 13 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*
 14 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal quotation omitted). In contrast, a
 15 moving party who does not bear the burden of proof “need only prove that there is an absence of
 16 evidence to support the non-moving party’s case[.]” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376,
 17 387 (9th Cir. 2010), and such a party may additionally produce evidence that negates an essential
 18 element of the nonmoving party’s claim or defense, *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,
 19 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the
 20 basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury
 21 finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323;
 22 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence
 23 and any inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell*
 24 *v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

25 Where the moving party meets its burden under Rule 56, the nonmoving party must
 26 “designate specific facts demonstrating the existence of genuine issues for trial. This burden is
 27 not a light one.” *In re Oracle Corp.*, 627 F.3d at 387 (internal citation omitted). “The non-
 28 moving party must show more than the mere existence of a scintilla of evidence. . . . In fact, the

1 non-moving party must come forth with evidence from which a jury could reasonably render a
 2 verdict in the non-moving party's favor." *Id.* (internal citations omitted). Although the
 3 nonmoving party need not produce authenticated evidence, *see* Fed. R. Civ. P. 56(c), mere
 4 assertions, pleading allegations, and "metaphysical doubt as to the material facts" will not defeat
 5 a properly-supported summary judgment motion, *Orr*, 285 F.3d at 783.

6 Additionally, courts are not to adopt at summary judgment the version of events told by
 7 one party that "is blatantly contradicted by the record, so that no reasonable jury could believe it, .
 8 . . ." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Where "the factual context makes the non-
 9 moving party's claim of a disputed fact implausible, . . . that party must come forward with more
 10 persuasive evidence than otherwise would be necessary to show that there is a genuine issue for
 11 trial." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (quoting *Blue Ridge*
 12 *Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998)); *see also Matsushita Elec. Indus. Co.,*
 13 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

14 III. DISCUSSION

15 Defendants move for summary judgment on two bases. First, they argue that plaintiff
 16 failed to exhaust his administrative remedies as to the claim against Baker. (#47 at 6-7.) Second,
 17 they argue that the record demonstrates that plaintiff cannot establish the necessary elements of
 18 an excessive force claim against Bruffy. (*Id.* at 7-11.) The court considers each argument in turn.

19 A. Exhaustion of Remedies under the PLRA

20 Defendants move for summary judgment on the claim against Baker on the basis of
 21 exhaustion, as required by the Prison Litigation Reform Act ("PLRA"). Specifically, they argue
 22 that the sole grievance that plaintiff filed regarding the March 7, 2011 incident, to which prison
 23 officials assigned the log number 2006-29-29520 (the "520 grievance"), fails to name Baker and
 24 otherwise describe the alleged wrongdoings from which the claim against her arises. (*Id.* at 6-7.)
 25 Plaintiff counters that, under *Jones v. Bock*, 549 U.S. 199, 218 (2007), an inmate plaintiff need
 26 not specifically name a prison official to properly exhaust the grievance process. (#49 at 1-2.)
 27 Because the NDOC's grievance process, embodied with Administrative Regulation ("AR") 740,
 28 does not require that NDOC inmates name the particular official, plaintiff maintains that his

1 grievance exhausted this claim. (*Id.* at 2.) Defendants respond that plaintiff’s failure to exhaust
 2 stems not from his failure to name Baker, but instead, from his failure to grieve the incidents
 3 themselves—namely, the allegations pertaining to the custody conditions following the March 7
 4 battery. (#40 at 7-8.)

5 **1. Legal Standard**

6 Under the PLRA, “[n]o action shall be brought with respect to prison conditions under [42
 7 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
 8 correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.
 9 § 1997e(a). The exhaustion requirement is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524
 10 (2002). Failure to exhaust is an affirmative defense, and the defendants bear the burden of proof.
 11 *Jones v. Bock*, 549 U.S. 199, 216 (2007). Within the Ninth Circuit, the proper vehicle for raising
 12 exhaustion is no longer a motion to dismiss, unless exhaustion—which need not be pled—is plain
 13 on the face of the complaint. *Albino*, 747 F.3d at 1168-69. Otherwise, defendants move for
 14 summary judgment on the basis of exhaustion, which “should be decided, if feasible, before
 15 reaching the merits of a prisoner’s claims.” *Id.* at 1169-70.

16 The PLRA requires “proper exhaustion” of an inmate’s claims. Proper exhaustion is the
 17 use of “all steps that the [prison] holds out,” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)
 18 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). The inmate must pursue
 19 these remedies “properly (so that the agency addresses the issues on the merits).” *Id.* (quoting
 20 *Pozo*, 286 F.3d at 1024) (emphasis original). Thus, exhaustion “demands compliance with an
 21 agency’s deadlines and other critical procedural rules because no adjudication system can
 22 function effectively without imposing some orderly structure on the course of its proceedings.”
 23 *Id.* at 90-91. Applicable procedural rules for proper exhaustion “are defined not by the PLRA,
 24 but by the prison grievance process itself.” *Jones*, 549 U.S. at 218.

25 “The level of [factual] detail in an administrative grievance necessary to properly exhaust
 26 a claim is determined by the prison’s applicable grievance procedures.” *Morton v. Hall*, 599 F.3d
 27 942, 946 (9th Cir. 2010) (citing *Jones*, 549 U.S. at 218). “[W]hen a prison’s grievance
 28 procedures are silent or incomplete as to factual specificity, ‘a grievance suffices if it alerts the

1 prison to the nature of the wrong for which redress is sought.” *Griffin v. Arpaio*, 557 F.3d 1117,
 2 1120 (9th Cir. 2009) (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)); *see also Sapp*
 3 *v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010). Because the purpose of the grievance “is not to
 4 lay the groundwork for litigation[,]” but rather “to alert the prison to a problem and facilitate its
 5 resolution,” the grievance “need not include legal terminology or legal theories unless they are in
 6 some way needed to provide notice of the harm being grieved.” *Griffin*, 557 F.3d at 1120. In
 7 other words, the grievance suffices as long as it sufficiently places prison officials on notice of
 8 facts by which they can determine the “root cause” of the issue, whatever may be the inmate’s
 9 legal theories or claims should litigation ensue. *See McCollum v. Cal. Dep’t of Corrs. and*
 10 *Rehab.*, 647 F.3d 870, 876-77 (9th Cir. 2011); *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir.
 11 2012).

12 Upon the defendants’ showing of an unexhausted available remedy, the burden shifts to
 13 the inmate “to come forward with evidence showing that there is something in his particular case
 14 that made the existing and generally available administrative remedies effectively unavailable to
 15 him.” *Albino*, 747 F.3d at 1172. A remedy is “available” when, as a practical matter, it is capable
 16 of use. *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). Where prison officials render
 17 administrative remedies “effectively unavailable” under the circumstances, an inmate’s failure to
 18 exhaust is excused. *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010).

19 **2. The NDOC’s Inmate Grievance System**

20 Inmates incarcerated within NDOC institutions may grieve “conditions of institutional
 21 life” pursuant to AR 740.² All grievances “alleging staff misconduct will be reviewed by the
 22 Warden and if deemed appropriate will be forwarded to the Office of the Inspector General . . . ,”
 23 AR 740.05(11), and allegations of “inmate abuse by Department staff . . . shall be immediately
 24 reported to the [Associate Wardens], the Warden, and the Inspector General’s Office . . . ,” AR
 25 740.03(2).

26
 27
 28 ² Defendants submitted with their motion an authenticated copy of AR 740 (#47 Exh. G-1), and the parties do not dispute the authenticity of the exhibit.

Ordinarily, the NDOC grievance process begins at the informal level. If the inmate is unable to resolve the issue through discussion with an institutional caseworker, *see* AR 740.04, the inmate is to file an informal grievance “[w]ithin six (6) months if the issue involves personal property damages or loss, personal injury, medical claims or any other tort claims, including civil rights claims[.]” AR 740.05(4). Although the inmate must submit “[a]ll documentation and factual allegations available” to him upon his filing an informal grievance, AR 740.05(5)(A), the AR makes contains no particular requirements analogous to a legal pleading standard or naming of responsible officials. An inmate who is dissatisfied with the informal response may appeal to the formal level within five days. AR 740.05(12).

At the first formal level, officials of a higher level respond. *See* AR 740.06(1). The inmate also “shall provide a signed, sworn declaration of facts that form the basis for a claim that the informal response is correct. . . . Any additional relevant documentation should be attached at this level.” AR 740.06(2). Within five days of a dissatisfactory first-level response, the inmate may appeal to the second level, which is subject to still-higher review. *See* AR 740.07(1).

3. Analysis

The court recommends summary judgment against plaintiff because he has failed to exhaust the claim against Baker. Count I’s claim against Baker pertains not to the alleged excessive force of the officers, but instead, alleged maltreatment in the form of deprivations and harsh conditions during plaintiff’s period of custody following his apprehension in the ESP culinary area. (*See* #5 at 14.) The parties do not dispute that the ‘520 grievance is the sole applicable grievance. Although plaintiff is correct that he did not need to name Baker specifically to exhaust the claim under AR 740, his rejoinder fails because the ‘520 grievance pertains solely to the alleged misconduct of various correctional officers on March 7, 2011.

The ‘520 grievance is entirely silent on any alleged wrongdoing that followed the incident. (*See* #47 Exh. G-2, at 2-17.) In his own words, plaintiff grieved about “staff abuse, battery, and torture; *which happened on March 7, 2011* when an incident occurred in the Culinary of Ely State Prison” (*Id.* at 2) (emphasis added). The description of the alleged wrongdoings in the ‘520 grievance confirm that plaintiff grieved not about the conditions of his

1 post-incident custody, but instead his purported maltreatment during his apprehension by
 2 correctional officers. Plaintiff extensively details claims of physical force—choking, kicking,
 3 being beaten and shoved into walls, and the like. In contrast, the grievance omits any reference to
 4 nakedness, property deprivation, and constant illumination in the following days.

5 The closest relation of any grievance statement to the allegations against Baker is
 6 plaintiff’s reference to his placement in a “small visiting closet” after being restrained. (*Id.* at 9-
 7 10.) Yet here, where he might have described the allegedly wrongful conditions of the closet and
 8 other units, whether at ESP or HDSP, in which he was allegedly held, he says nothing related to
 9 the “nature of the wrong[s]” for which he seeks redress. *Griffin*, 557 F.3d at 1120. Although he
 10 did not need to present particular legal theories or recite legally meaningful language, he faced
 11 the minimal requirement of apprising NDOC officials of facts from which they could determine
 12 the “root causes” of the custody issues. *McCollum*, 647 F.3d at 876-77; *Akhtar*, 698 F.3d at 1211.
 13 That entailed grieving the conditions in which he was held, the investigation of which would have
 14 allowed officials to discover Baker’s order—if, in fact, she had instructed officials to act in the
 15 way that plaintiff alleges—so that they could take actions to correct it. Because he failed to
 16 describe these alleged wrongdoings, he failed to give notice and thereby properly grieve the
 17 claim. Accordingly, the court concludes that summary judgment on the claim against Baker is
 18 proper, and recommends that defendants’ motion be granted.

19 **B. Eighth Amendment Excessive Force**

20 Unlike the claim against Baker, defendants concede that plaintiff has properly exhausted
 21 with respect to Bruffy. (#50 at 7.) Nevertheless, they move for summary judgment on the basis
 22 that plaintiff will be unable to establish the elements of an excessive force claim. (#47 at 8-11.)
 23 Plaintiff counters that because the parties dispute particular facts, he must survive summary
 24 judgment. (#49 at 4.) Defendants rejoin that the evidence, even when viewed in favor of
 25 plaintiff, does not support his allegations. (#50 at 8.)

26 As a preliminary issue, the complaint alleges excessive force against Bruffy only relating
 27 to his restraint and apprehension of plaintiff in the culinary area. (#5 at 9.) Although plaintiff’s
 28 complaint, grievance, and deposition testimony airs sweeping allegations against several prison

officials, including allegations relating to his walk to an ESP holding area and repeated beatings in that holding cell, the complaint focuses the allegations against Bruffy to a specific number of actions that purportedly occurred prior to his transfer to custody following the noon-time battery on March 7. Because plaintiff is represented by counsel, the court reads the complaint by its plain language and construes the claim against Bruffy to focus only upon those pre-transfer events in the culinary area.

1. Legal Standard

The Eighth Amendment’s proscription on cruel and unusual punishment forbids prison officials from inflicting “the unnecessary and wanton infliction of pain” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Encompassed within the Eighth Amendment is a bar on the use of excessive force against prisoners. *See Hudson v. McMillian*, 503 U.S. 1, 7-10 (1992). Courts in the Ninth Circuit apply a five-part balancing test to excessive force claims: (1) the extent of the inmate’s injuries; (2) the need for application of force; (3) the relationship between the need and amount of force; (4) the threat reasonably perceived by prison officials; and (5) any efforts that officials utilized to “temper the severity of a forceful response.” *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321); *see also Wilkins v. Gaddy*, 559 U.S. 34, 36-38 (2010); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

The inmate must demonstrate that officials acted maliciously and sadistically to prevail. “[W]henever prison officials stand accused of using excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 6-7. As the Ninth Circuit has explained,

[t]he “malicious and sadistic” standard arose out of “the need to maintain or restore discipline” inside the prison. When a prison disturbance occurs, prison officials must make “decisions ‘in haste, under pressure, and frequently without the luxury of a second chance.’” In these situations, prison officials are “accorded wide-ranging deference” and therefore, prisoners alleging excessive force must show that the force was applied “maliciously and sadistically to cause harm.”

Wood v. Beauclair, 692 F.3d 1041, 1049-50 (9th Cir. 2012) (quoting *Hudson*, 503 U.S. at 6 and *Whitley*, 475 U.S. at 320). Thus, the court must be careful when reviewing the factors to verify

1 indicia of “such wantonness with respect to the unjustified infliction of harm as [is] tantamount to
2 a knowing willingness that it occur.” *Hudson*, 503 U.S. at 9.

3 **2. Analysis**

4 In light of the record, Bruffy is entitled to summary judgment. The evidence submitted by
5 defendants renders plaintiff’s tale implausible, and the court concludes that his burden to
6 demonstrate genuine factual disputes is, therefore, a heightened one. *LVRC Holdings*, 581 F.3d at
7 1137. Plaintiff’s uncorroborated deposition testimony does not carry the burden.

8 **a. Evidence in the Record**

9 Prior to turning to the relevant factors, the court addresses a preliminary evidentiary issue.
10 For the most part, the parties rely largely upon the same evidence. Of relevance to defendants’
11 motion is plaintiff’s deposition testimony (#47 Exh. A); an “Unusual Occurrence Report,” which
12 documented plaintiff’s medical condition following the culinary altercation (#47 Exh. G-4);
13 plaintiff’s medical requests between March 7, 2011 and December 31, 2011 (#50 Exh. F); video
14 footage of a portion of the March 7 incident (#47 Exh. F); declarations from Bruffy and
15 Lieutenant Ronald Bryant (#47 Exhs. D, E); and internal staff reports in which prison officials
16 describe their various roles and observations of the incident (#47 Exh. G-5).

17 Plaintiff opposes summary judgment on the basis of his deposition testimony and also a
18 series of witness statements during his criminal trial for the battery. (#49 at 3-4.) The testimonial
19 statements are those of three individuals by the names of Palczewski, Drummond, and Smith.
20 (See #49 at 3 and associated exhibits.) The record and briefing indicates that Palczewski is
21 another inmate, Drummond is a former ESP official, and Smith is an ESP nurse. As the court
22 explains below, these statements are not admissible evidence. The court thus sets them aside.

23 Although a party opposing summary judgment need not submit authenticated evidence,
24 the evidence upon which he relies must be admissible. *Orr*, 285 F.3d at 773 (citing Fed. R. Civ.
25 P. 56(e) and *Beyene v. Coleman Sec. Servs., Inc.*, 874 F.2d 1179, 1181 (9th Cir. 1988)).
26 Inadmissible evidence generally includes hearsay statements. Fed. R. Evid. 802. Hearsay is any
27 oral assertion by an out-of-court declarant offered to prove the truth of the matter asserted. Fed.
28 R. Evid. 801(a)-(c). Here, each individual is an out-of-court declarant, and their statements are

1 offered to prove various facts—including whether plaintiff had been resisting restraint and his
2 treatment by Bruffy and other correctional officers. (*See* #49 at 3.) Thus, the remarks fall within
3 Rule 801’s definition of hearsay.

4 Moreover, because each statement is provided in a trial transcript, they are the court
5 reporter’s statements about the testimonial remarks. This renders them hearsay within hearsay.
6 Further, a portion of Smith’s statements feature a third-level of hearsay, for he testifies about
7 what plaintiff told him. (*See* #49 Exh. 7, at 395:7-10) (describing the contents of plaintiff’s
8 remarks). Where hearsay has multiple levels, each must fall within an exception for the statement
9 to be properly admitted. Fed. R. Evid. 805. Unless an exception applies to each level, the
10 statements are inadmissible. Fed. R. Evid. 802, 805.

11 None of the statements falls within an exception at each level; therefore, they are
12 inadmissible. As a preliminary matter, the public records exception in Rule 803(8) applies to the
13 court-reporter level of hearsay. *United States v. Arias*, 575 F.2d 253, 254 (9th Cir. 1978) (holding
14 that a trial transcript is admissible under the FRE 803(8)). However, that exception does not
15 apply to the witness statements themselves, for they are offered to prove the truth of the matters
16 asserted. *See id.* at 254 n.1; *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952). No
17 exception applies to the other levels. Rule 804(b)(1) allows admission of former testimony,
18 whether at trial or deposition, only when the declarant is “unavailable.” Unavailability is limited
19 to particular instances, *see* Fed. R. Evid. 804(a), and the proponent must prove that one of those
20 instances applies, *United States v. Lopez-Cruz*, 470 F.2d 193, 194 (9th Cir. 1972). Plaintiff has
21 not stated—let alone proven—that any one of these three individuals is unavailable in this
22 proceeding, and thus, the exception does not apply. Further, without exhaustive analysis of each
23 of the twenty-three possibilities in Rule 803, it is plain that these exceptions are inapplicable here.
24 *Cf. Trs. of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 905 (3d Cir. 1987) (“Admission of
25 prior testimony through a court transcript, . . . would emasculate large portions of the hearsay
26 rule.”). Accordingly, the court shall not consider these testimonial statements when considering
27 plaintiff’s opposition.
28

1 **b. Discussion**

2 The court now turns to the claim. Bruffy responded to an emergency situation involving
3 plaintiff's attack of a prison official. (#47 Exh. D, at ¶ 5.) The incident gave rise to the officers'
4 reasonable perception of threat by plaintiff; thus, consistent with the deference this court owes to
5 prison officials responding to a violent situation, Bruffy had justification to use some level of
6 force. Although the parties dispute the extent to which plaintiff resisted apprehension, a fact that
7 goes to the need for force, the issue is ultimately immaterial. The record renders implausible
8 plaintiff's far-reaching allegations about the amount of force Bruffy employed, and in light of the
9 circumstances, the record supports the conclusion that Bruffy's use of force was neither wanton
10 nor sadistic, as required for a jury to render a verdict in plaintiff's favor.

11 The court is mindful that excessive force cases "nearly always requires a jury to sift
12 through disputed factual contentions, and to draw inferences therefrom," and for this reason, the
13 Ninth Circuit has "held on many occasions that summary judgment or judgment as a matter of
14 law in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853
15 (9th Cir. 2002); *see also Lolli v. Cnty. of Orange*, 351 F.3d 410, 415–16 (9th Cir. 2003); *Liston v.*
16 *Cnty. of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir.1997) (citing cases). Nevertheless, the court
17 proceeds cautiously because the Supreme Court instructs that courts should afford deference to
18 the actions of prison officials who respond to emergency situations, and therefore, cases ought not
19 go to the jury unless the facts support "a reliable inference of wantonness in the infliction of pain .
20 . ." under the applicable factors. *Whitley*, 475 U.S. at 321-22.

21 In this case, the parties offer two competing narratives of Bruffy's actions following the
22 March 7, 2011 battery. On one hand, defendants contend that Bruffy and others used some level
23 of force, but only enough to overcome plaintiff's resistance. (#47 Exh. D, at ¶ 8; Exh. E, at ¶ 8,
24 14.) On the other, plaintiff offers through his deposition testimony a version of events featuring
25 egregious maltreatment that resulted in severe injuries. He states:

26 At one point, Officer Bruffy, his knee had slid from the area behind my right ear to
27 actually being directly on my right ear. And he was twisting his knee into that ear,
28 forcing my —the opposite ear, the ear on the floor, to be crushed into the floor so I
couldn't hear anything. And he was yelling profanities and obscenities at me, you
know, "Shut up and take it. You've only just begun to feel pain." But I'm

1 desperate to – what can I do to get him to stop this? But I couldn’t say anything. If
2 I tried to speak a word, he would knee me in the mouth, knee me in the eye, and go
3 back to screaming obscenities at me. As it turns out, toward the end of – of that,
after about thirty minutes, he had moved to choking me with the collar of my
jumpsuit.

4 And I had – I had never felt more resigned to accepting death than at that moment.
5 I honestly felt like this is it. Right now, this moment, this is where I die, as he
6 choked me unconscious. I regained consciousness sometime later and I was under
the impression that somebody had thrown some kind of slurry or something on my
7 face. But as it turns out, as I was unconscious, I vomited. And Bruffy went then to
drowning me in the vomit on the floor. And then, again, used the collar on my
jumpsuit to choke me unconscious a second time.

8 (#47 Exh. A, at 40:21-41:20.)

9 The record before the court renders plaintiff’s version of events wholly implausible. It is
10 an undisputed fact in the record that the battery occurred sometime around noon. (#47 at Exh. G-
11 5.) Plaintiff states that “several minutes” passed from the moment prison staff responded to the
12 incident in the culinary area before they “jumped on his back” and began abusing him. (#47 Exh.
13 A, at 36:25-37:15, 37-42.) The video footage begins sometime around 12:05 p.m., and about
14 eight minutes later—that is, approximately fifteen minutes after the battery had occurred—
15 plaintiff’s escort to the holding area begins. (See #47 Exh. F at 0:03, 8:00.) Thus, within that
16 thirteen to fifteen minute window, less “several minutes” during which plaintiff allegedly lay on
17 the ground untouched, Bruffy somehow savagely beat him for “thirty” minutes. (#47 Exh. A, at
18 40:18-20, 41:8.) Plaintiff’s repetition of the time frame—and, in fact, concession that he
19 perceived it to be one hour prior to later clarification—counsels against construing his use of time
20 as mere hyperbole.

21 Also around the eight-minute mark, plaintiff appears in the video. The video depicts none
22 of the actions plaintiff attributed to Bruffy, so all of the kicking, choking, kneeling and the like
23 must have occurred prior to that time. Thus, when plaintiff appears, it is at a moment directly
24 following the minutes in which Bruffy allegedly committed the various atrocities. (#47 Exh. F, at
25 8:20.) However, it is plain from plaintiff’s appearance that he had not been subject to grotesque
26 violence. In short, no person who had been choked, booted, kneed, and crushed into the floor for
27 a significant period of time could appear as does plaintiff in the video. He may be distraught, but
28 he is not grievously injured.

1 In his deposition, plaintiff goes on to state that, upon the decision to move him into
 2 holding, one of the correctional officers “use[d] the handcuffs as leverage to dislocate my fingers.
 3 I believe he broke my thumb. . . . I believe he broke my right wrist.” (#47 Exh. A, at 51:8-11.)
 4 Once again, the video forecloses this allegation.³ Although plaintiff groans audibly as prison
 5 officials hold him, the location of the officers’ hands is visible as plaintiff is turned toward the
 6 door. The video’s quality is somewhat poor, but when it is viewed frame by frame, it is evident
 7 that the officers are not leveraging the handcuffs in the way plaintiff contends. Instead, the
 8 officers are holding plaintiff’s upper arms and mid forearms. (See #47 Exh. F.) Thus, although
 9 the video does not document the minutes surrounding his placement into restraints and during
 10 which he alleges that he faced excessive force, it renders implausible his version of these events.⁴

11 Ordinarily, the above discrepancies might be insufficient as a basis for granting summary
 12 judgment, for they do not absolutely preclude the existence of various factual issues. It is
 13 axiomatic that the court must view the facts in a light most favorable to plaintiff, and as such, it is
 14 possible that he simply did not sustain immediate physical indicia of harm and the alleged
 15 incidents occurred over a smaller period of time. See *Wilkins*, 559 U.S. at 38 (“Injury and force . .
 16 . are only imperfectly correlated . . .”). Yet plaintiff’s medical files also enter the court’s
 17 analysis, and they more strongly confirm that his story is outside the realm of possibility. In an
 18 “Unusual Occurrence Report” dated March 7, 2011, LPN Smith described plaintiff’s condition

19
 20 ³ Relatedly, the video renders undisputed that no excessive force occurred during plaintiff’s move
 21 to the holding area. The record suggests that Bruffy was one of the officers who escorted
 22 plaintiff. To the extent that the District Court wishes to construe the complaint as encompassing
 23 these actions, this court recommends summary judgment be granted on the basis of the video
 24 footage. The depiction therein forecloses plaintiff from establishing excessive force, for it is
 plain from the video that Bruffy (and others) used only as much force was necessary to walk
 plaintiff to the cell, and nothing—including the incident where plaintiff is held against the wall,
 when he appears to be resisting their control—supports the conclusion that they acted with malice
 and intent to harm him.

25 ⁴ For clarity, the court is not discrediting plaintiff’s story on the grounds of his credibility, for that
 26 is the sole province of a jury. Instead, based upon the video’s depictions, the court has
 27 determined that no reasonable jury could accept his allegations because, without other evidentiary
 28 support, they are deeply implausible in light of the record. Were his factual contentions more
 limited in nature, they might be entirely consistent with his physical appearance and the medical
 records the court discusses above. Yet his grave and sweeping allegations are consistent across
 his complaint, his grievance, and his deposition testimony. Consequently, there is little basis to
 infer that there is a milder alternative version of the events aside from the one defendants
 articulate.

1 soon after the beating allegedly occurred. Smith noted some minor abrasions, bruising, and pain
 2 upon palpitation to plaintiff's thumbs. (#47 Exh. G-4.) Yet absent from the report is any
 3 indication of broken bones, massive swelling related thereto, broken teeth, bruising on plaintiff's
 4 eyes, a dislocated jaw, or any other severe injury from which a jury could infer that Bruffy acted
 5 in the manner plaintiff contends. Moreover, Smith stated that plaintiff's condition did not
 6 indicate medical treatment whatsoever at that time.⁵ (*Id.*) At bottom, plaintiff's allegations are
 7 not remotely consistent with the medical documentation and treatment conclusion Smith reached.

8 Additionally, defendants submit all of plaintiff's medical treatment requests from March
 9 7, 2011 to December 31, 2011. Not once did plaintiff request treatment for horrific injuries, pain,
 10 and the like. He requested on several occasions, however, treatment for painful outbreaks related
 11 to the herpes virus, headaches, allergies, and fiber laxatives. (#50 Exh. F.) It is simply beyond
 12 credulity that plaintiff would request treatment for these conditions—certainly, not minor ones—
 13 but tender no requests for more severe injuries consisting of several broken bones, crushed ears,
 14 and other significant injuries—if, in fact, the latter were present. Once again, the extent of
 15 plaintiff's allegations is dispositive to the summary judgment inquiry. Comparing the record to
 16 his allegations, the latter are simply beyond what a reasonable jury could divine from the record.

17 Accordingly, the court concludes that the heightened summary judgment burden, *see LVRC*
 18 *Holdings*, 581 F.3d at 1137, applies in this case.⁶ In order to return a verdict in plaintiff's favor, a
 19 juror would have to accept as true plaintiff's uncorroborated deposition testimony as to the

21 ⁵ Plaintiff argues in his opposition that he feared retaliation and, therefore, limited his remarks
 22 about his purported injuries during Smith's evaluation. (#49 at 4; #47 Exh. A, at 65:15-18.)
 23 However, he also states that he "didn't need to" describe his injuries because Smith "saw the
 24 damaged and noted it." (#47 Exh. A, at 65:23-24.) Thus, the court's analysis of Smith's report is
 25 unaltered by his deposition statements. As plaintiff makes no suggestion that Smith inaccurately
 26 described the injuries or purposively concealed the extent thereof, there is no basis for inferring
 27 that plaintiff, contrary to the medical documentation, had broken bones and other indicia of
 28 Bruffy's allegedly violent attack upon him.

⁶ Not all instances of contradiction in the evidence supports a court's imposition of the
 heightened burden or rejection of a party's story as "blatantly contradicted." For example, in
Young v. County of Los Angeles, the Ninth Circuit held that a plaintiff's conflicting statements as
 to how many times he had been struck, in an excessive force case, did not render the evidence
 blatantly contradictory. 655 F.3d 1156, 1161 & n.6 (9th Cir. 2011). This case is unlike *Young*,
 however. The implausibility of plaintiff's allegations is not limited to some smaller issue, such as
 the number of times he was kicked or choked. Instead, the evidence undermines the very heart of
 his contention that Bruffy acted with excessive force.

1 physical violence and disregard the complete lack of contemporaneous medical evidence and the
 2 significant discrepancies in plaintiff's story. A juror would have to accept that plaintiff was
 3 wantonly abused despite the overwhelming evidence to the contrary, while also ignoring
 4 plaintiff's simultaneous testimony about his horrific injuries. Such a juror would not be
 5 reasonable, and jurors may draw only those inferences the evidence reasonably supports.

6 In sum, only plaintiff's unpersuasive and uncorroborated deposition testimony supports
 7 his allegations regarding the force Bruffy used and the injuries he sustained. Although injury,
 8 itself, is not required to prevail, *see Hudson*, 475 U.S. at 9, plaintiff's relative lack of injuries
 9 provides "some indication of the amount of force applied." *Wilkins*, 559 U.S. at 37. Although
 10 Smith's report documented some degree of injury, the report is consistent not with wanton and
 11 "unjustified infliction of harm . . . [,]" but instead, only "with a good faith effort to maintain or
 12 restore discipline," *Hudson*, 503 U.S. at 7. Consequently, this case provides no "reliable
 13 inference" of excessive force, and ought not go to the jury. *Whitley*, 475 U.S. at 321-22.

14 IV. CONCLUSION

15 Because the court has concluded that plaintiff has not grieved the allegations against
 16 Baker, and also that the evidence in the record prevents a reasonable jury from rendering a verdict
 17 in plaintiff's favor as to the alleged events of March 7, 2011, the court recommends that
 18 defendants' motion for summary judgment (#47) be granted.

19 The parties are advised:

20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 21 Practice, the parties may file specific written objections to this Report and Recommendation
 22 within fourteen days of receipt. These objections should be entitled "Objections to Magistrate
 23 Judge's Report and Recommendation" and should be accompanied by points and authorities for
 24 consideration by the District Court.

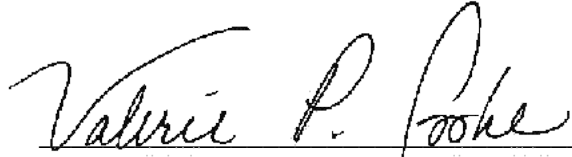
25 2. This Report and Recommendation is not an appealable order and any notice of
 26 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
 27 judgment..
 28

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (#47) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the Clerk **ENTER JUDGMENT** and close this case.

DATED: June 23, 2015.


UNITED STATES MAGISTRATE JUDGE